

THE MARK O. HATFIELD

# COURTHOUSE NEWS

A Summary of Topical Highlights from decisions of the  
U.S. District Court for the District of Oregon

A Court Publication Supported by the Attorney Admissions Fund  
Vol. V, No. 16, July 15, 1999

## Employment

In a diversity case brought by former employees and their spouses against a former employer for reckless and intentional misrepresentation, Chief Judge Michael R. Hogan ruled that, despite dismissal of the intentional infliction of emotional distress claim, plaintiffs could seek emotional distress damages as an aspect of the reckless and intentional misrepresentation claims. Plaintiffs alleged that defendants fraudulently induced plaintiffs to either quit their jobs or pass up other employment opportunities, move to Eugene, and enter into employment relationships with the defendant employer who allegedly had already decided to close its Eugene plant at the time of the interviews. Judge Hogan noted that dismissal of the intentional infliction of emotional distress claim did not necessarily prevent plaintiffs from seeking emotional distress damages as merely an aspect of damages of an independent claim, such as misrepresentation. Although Oregon courts have not addressed whether emotional distress damages may be sought based on misrepresentations, Judge Hogan found that, based on dicta in Oregon court decisions and their emphasis on the emotional impact of employment decisions, Oregon

courts would find emotional distress damages recoverable in this situation. Meade v. Cedarapids, Inc., CV 95-6307-HO (Order, July 7, 1999 - 11 pages).

Plaintiffs' Counsel: Richard Busse  
Defense Counsel: George Kirklin

7 A truck driver filed an action against his former employer claiming that he was constructively discharged due to same sex harassment by a fellow employee. Plaintiff recounted two instances in which the alleged harasser had either exposed or touched his own genitals and one incident in which he attempted to grab the plaintiff's genitals. Plaintiff complained, and following a warning, the alleged harasser was terminated. Plaintiff quit during the BOLI investigation, 10 months after the alleged harasser was fired.

Judge Robert E. Jones held that while the challenged activity was "tinged with sexual" overtones, plaintiff failed to show that the alleged harasser's actions occurred "because of" plaintiff's sex. Noting that Oregon courts have yet to address the issue of whether O.R.S. 659 prohibits same-sex harassment, the court declined to retain jurisdiction over supplemental claims and dismissed the remainder of the action. Litwin v. L&W

Supply Corp., CV 98-791-JO  
(Opinion, June 22, 1999 - 12 pages).

Plaintiff's Counsel: Robert Birk  
Defense Counsel: David Wilson, Jr.

q A former school district custodian filed an action pursuant to § 1983 alleging that his due process rights were violated when the district accused him of performance problems and of misrepresenting the number of hours worked. Plaintiff claimed that defendant's accusation impinged upon his honesty and integrity and that he was denied procedural due process rights due under Oregon law.

Judge Ann Aiken found that plaintiff stated a claim since the district's allegations did in fact implicate plaintiff's honesty, however plaintiff's claim failed because there was no evidence that defendant ever disclosed the allegations publicly and plaintiff was given several opportunities to rebut the accusations. The court further found that the plaintiff was given all process due under the Oregon statutes and noted that even if plaintiff had a substantive due process right to continued employment, defendant's termination decision was neither arbitrary nor capricious. Accordingly, the court granted the

## 2 The Courthouse News

defendant's motion for summary judgment. Robertson v. Portland Public School Dist. No. 1J, CV 98-1572 (Opinion, July, 1999 - 8 pages).

Plaintiff's Counsel: Dawna Scott  
Defense Counsel: Jeffrey Austin

## Procedure

A majority shareholder of a closely held corporation filed an action against a fellow shareholder who is also the company president. Plaintiff asserted claims for breach of fiduciary duty, violations of the covenant of good faith and fair dealing and a shareholder derivative claim. Defendant moved to dismiss for lack of diversity jurisdiction and failure to join a necessary party under Fed. R. Civ. P. 19.

Judge Robert E. Jones held that the company was an indispensable party to the shareholder derivative action and thus, joinder under Rule 19 was required. The issue remaining was whether the company should be joined as a plaintiff or as a defendant-- if joined as a plaintiff, it would destroy diversity jurisdiction. The court noted that a company initially named as a defendant could be re-aligned as a plaintiff. However, Judge Jones held that the company should be added as a defendant if the corporate management is antagonistic to the plaintiff. Because that condition was met, Judge Jones directed the plaintiff to add the company as a defendant and denied defendant's motion to dismiss for lack of diversity jurisdiction. Trabucco v. Carlile,

CV 98-1106-JO (Opinion, June, 1999- 7 pages).

Plaintiff's Counsel: Thomas Dulcich  
Defense Counsel: John McGrory

7 Title 28 U.S.C. § 1406 permits a district court to transfer an action "in the interests of justice" after determining that it lacks jurisdiction. Judge Ann Aiken recently found that justice required dismissal rather than a transfer where the plaintiff failed to timely respond to a motion to dismiss for lack of personal jurisdiction and then conceded that the court lacked personal jurisdiction over the defendant. Judge Aiken noted that the case was a relatively simple personal injury claim arising out of activities in Washington, such that there was no apparent basis for plaintiff's decision to file the case in Oregon. Tower v. Driscoll, CV 99-286-AA (Opinion, July, 1999 - 8 pages).

Plaintiff's Counsel: Roger Hennagin  
Defense Counsel: Jan Kitchel

## Social Security

A claimant who fails to raise objections at the administrative level waives the challenge when proceeding in an action against the Commissioner before the district court. Judge Robert E. Jones held that such a waiver was ineffective, however, where the defendant failed to specify the scope of the waiver. In considering the merits of the case, the court expressed concern over whether a claimant could waive a claim that the ALJ failed to fully

develop the record. In considering this claim, Judge Jones noted that this argument has become commonplace in social security appeals and expressly rejected the suggestion that an ALJ owes a duty to seek additional information regarding a claimant's impairments in every case. Given the voluminous medical records, lack of ambiguities or inconsistencies, the court found that there was no need for the ALJ to seek additional evidence. However, because the ALJ failed to explain why he omitted the claimant's hand shakiness from the vocational expert's hypothetical, remand was required. Purvis v. Social Security Administration, CV 98-1044-JO (Opinion, July, 1999 - 15 pages).

Plaintiff's Counsel: David Lowery  
Defense Counsel:  
William Youngman

## Subscriptions

Hard Copy subscriptions are available for \$40/year. Simply send a check payable to the "Attorney Admissions Fund" to:

Subscriptions  
1507 U.S. Courthouse  
1000 S.W. Third  
Portland, OR 97204-2902

E-mail subscriptions are FREE. Simply send your e-mail address to [kelly\\_zusman@ce9.uscourts.gov](mailto:kelly_zusman@ce9.uscourts.gov) and asked to be added to the list.

## Copies

Hard copies of referenced

### **3 The Courthouse News**

district court cases may be obtained by visiting the clerks office (.15/page) or by contacting the clerks office (326-8008 - civil; 326-8003 - criminal) ( .50/page).

**Computer copies of most district court opinions included in this newsletter may be accessed instantly (almost) and free of charge simply by sending your request via e-mail to:  
kelly\_\_zusman@ce9.uscourts.gov**